

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NOAH LAMARK SHELTON,

Defendant-Appellant.

UNPUBLISHED

September 17, 1999

No. 208911

Ingham Circuit Court

LC No. 97-072112 FC

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, conspiring to intentionally discharge a firearm at a dwelling, MCL 750.234b; MSA 28.431(2) and MCL 750.157a; MSA 28.354(1), intentional discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to 25 to 40 years' imprisonment for the murder conviction, 2 ½ to 4 years' imprisonment for both the intentional discharge and conspiracy to intentionally discharge convictions, and the mandatory 2-year term for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant first argues that the prosecutor committed misconduct in her closing argument, challenging the prosecutor's remark that Landis Grady, defendant's alleged accomplice, did not receive any benefit for his testimony against defendant. A defendant must object to instances of alleged prosecutorial misconduct at trial. *People v Dalessandro*, 165 Mich App 569, 578; 419 NW2d 609 (1988). Defendant did not object. Therefore, we may only examine the record for a miscarriage of justice. *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997).

We find no miscarriage of justice in this instance. Prosecutors have considerable freedom when making a closing argument. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). The prosecutor's argument simply relied on Grady's testimony, elicited by defense counsel on cross-examination, that he was not receiving any benefit for his testimony. This was a proper comment on the

evidence. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). The prosecutor did not suggest that she had any special knowledge of whether the witness testified truthfully, nor did she vouch for him. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Reversal on this ground is not required.

Defendant also challenges the prosecutor's motion, on the first day of trial, to endorse Grady as a witness pursuant to MCL 767.40a; MSA 28.980(1). We review a trial court's decision to permit a prosecutor to endorse a witness less than thirty days before trial for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). MCL 767.40a(4); MSA 28.980(1)(4) permits a prosecuting attorney to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." Accordingly, we have interpreted this statute to mean that an objecting defendant must show prejudice from the late endorsement. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991).

Defendant contends that the trial court failed to find that the prosecutor had good cause for the late endorsement. However, even if the trial court erred by accepting the prosecutor's good cause argument, "any error must be measured by the extent to which the purpose of the endorsement requirement, to allow a defendant to adequately prepare for trial, was impaired." *People v Kanouse*, 131 Mich App 363, 367-368; 346 NW2d 101 (1984). Although defendant suggests on appeal that late witness endorsement may prejudice defendants in general, he has never suggested that the late endorsement prevented him from preparing to cross-examine Grady or engage in any other relevant trial preparation. In the absence of prejudice to defendant, we find no abuse of discretion in the trial court's decision to endorse Grady.

Finally, defendant argues that his convictions for second-degree murder and intentionally discharging a firearm at a dwelling or occupied structure violate the prohibition against double jeopardy by subjecting him to multiple punishments for the same act, killing Esmeralda Robles. Defendant did not make this argument in the lower court. However, he may raise this constitutional issue for the first time on appeal. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). This question of law requires review de novo. *People v Price*, 214 Mich App 538, 542; 543 NW2d 49 (1995).

The analysis of double jeopardy claims under the Michigan Constitution requires a determination if the Legislature intended the punishment meted out to a defendant by analyzing the subject, language, and history of the statutes. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997); *People v Robideau*, 419 Mich 458, 486-487; 355 NW2d 592 (1984). First, we determine if the statutes serve different social norms. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Second, we compare the amount of punishment authorized by the two statutes to determine if they are hierarchical or cumulative. *Id.* If the purposes of the statutes are too similar or if the punishments are cumulative then, absent evidence that the Legislature intended this sort of punishment, the dual convictions are unconstitutional. *Robideau*, *supra* at 487-488.

The limited text of the second-degree murder statute, MCL 750.317; MSA 28.549, suggests an equally limited or narrow social purpose intended by the Legislature: to protect people from intentional killings. In contrast, the intentional discharge statute, MCL 750.234b; MSA 28.431(2), is

designed to prevent a wide variety of harms. Those harms include death, personal injury short of death, damage to property, and the emotional effect of a shooting on residents of the dwelling or occupied structure. Nor are the sentences for the two crimes cumulative or hierarchical. *Harrington, supra* at 428. An intentional discharge conviction may result in a fine up to \$2,000 or up to four years' imprisonment. MCL 750.234b(1); MSA 28.431(2)(1). Second-degree murder is punishable by any term of years or life in prison. MCL 750.317; MSA 28.549. These punishments do not suggest that second-degree murder is merely an aggravated form of intentional discharge. *Robideau, supra* at 487-488. The wide gap in these punishments also indicates a dissimilarity in the purpose of criminalizing these acts, with second-degree murder punishing a significantly more severe and socially condemned act. Consequently, defendant's convictions under these two statutes did not constitute multiple punishments for the same crime under the Michigan Constitution.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder